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# Supreme Court of the United States

No. .....

B. G. SOLOMON,

*Petitioner,*

v.

SEABOARD COAST LINE RAILROAD COMPANY, A BODY CORPORATE,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### I.

### PRELIMINARY STATEMENT[1]

This is a negligence case under the Federal Employers' Liability Act (FELA).[2] It presents no legal questions not previously resolved, nor is there any dispute over the principles to be applied. The only question is the application of established principles and clearly defined rules to the facts of this case.

[1] Appellant, B. G. Solomon, will be referred to throughout as "appellant." Respondent, Seaboard Coast Line Railroad Company, will be referred to throughout as "Seaboard."

All emphasis has been added unless otherwise noted and references to the transcript will be indicated by the letter "T," followed by the appropriate page numbers.

[2] 45 U.S.C. § 51, et seq. (1964).

Reduced to its essentials, appellant's Petition for Certiorari is based on two contentions[3]: First, appellant contends that Seaboard's furnishing of motor vehicle transportation rather than rail transportation constitutes negligence under FELA inasmuch as rail transportation may be statistically safer. Secondly, appellant contends that Seaboard's failure to furnish a driver constitutes negligence under FELA inasmuch as it sometimes took Seaboard a few minutes to furnish a driver and had it done so in this case, appellant would not have been at the point of impact at the precise time of impact.

Manifestly, both contentions are wholly without merit. To adopt either would effectively eliminate any fault requirement from FELA and make railroads the insurers of their employees, a result not contemplated by Congress in passing the Act nor by the Supreme Court in construing it.

## II.

## QUESTIONS PRESENTED

1. Can it be said that the failure to furnish a driver constitutes negligence under the FELA even though it is clear that appellant was an experienced, competent driver, thoroughly familiar with the type of vehicle involved and it is undisputed that there was nothing appellant or any other driver could have done to prevent the accident as the collision was entirely the fault of the driver of the other vehicle?

2. Can it be said that the failure to furnish a driver is the legal cause, in whole or in part, of appellant's injuries simply because it usually took a few minutes to provide a driver and, had one been supplied in this case, it is speculated that appellant might not have

[3] These contentions are stated by appellant's counsel at T. 41, 88-89.

been at the point of impact at the precise time of impact?

3. Does the railroad custom of transporting hostlers by motor vehicle when rail transportation is unavailable constitute negligence under the FELA simply because rail transportation may be statistically safer?

## III.

## STATEMENT OF FACTS

The facts pertinent to this Petition for Certiorari may be briefly stated. Employed by Seaboard as a "hostler," appellant was chiefly responsible for coupling and uncoupling engines and for transporting engines between Seaboard's passenger station in Hamlet, North Carolina, and its diesel shop, approximately three to four miles north of Hamlet. (T. 23, 24). On September 9, 1967, appellant reported for work at the passenger station in Hamlet. (T. 31). Appellant's final task on that date was to transport three engines from Hamlet to the diesel shop. (T. 32, 33). On completing this task, appellant's supervisor made a Seaboard pickup truck available to appellant and his helper so that they might return to Hamlet.

Appellant's testimony established that it was customary for Seaboard to provide hostlers with either rail or motor vehicle transportation back to Hamlet from the diesel shop. (T. 25).[4] If a hostler delivered an engine to the diesel

[4] On this point, appellant also offered the testimony of both Charles M. Hughes, a locomotive engineer with the Richmond, Fredericksburg & Potomac Railroad and L. Oakley, a locomotive fireman and engineer with the Norfolk & Western Railroad. On cross-examination, both admitted that they had no first-hand knowledge of customs, practices or procedures of the Seaboard. (T. 72, 79). Both also admitted that trains and motor vehicles were both customary modes of transportation for hostlers on their respective railroads. (T. 73, 76).

shop and there was no engine to be returned to Hamlet and no other rail transportation returning to Hamlet at the time, then it was customary for the hostler to return to Hamlet by motor vehicle. (T. 25). By the same token, if an engine needed to be moved from the diesel shop to Hamlet, a hostler would sometimes travel to the diesel shop by motor vehicle. (T. 25).

On many occasions, Seaboard supplied a driver for the motor vehicle. (T. 26). Sometimes, though, hostlers drove the motor vehicles themselves. (T. 26). In this instance, no driver was supplied and appellant drove the vehicle himself. According to appellant's excluded testimony, the result of the failure to furnish a driver was that his departure from the diesel shop was earlier than it would have been had a driver been assigned. (T. 43-46).

The vehicle furnished to appellant by Seaboard was a pickup truck which, according to appellant himself, was in good condition and "drove well." (T. 65). In addition, appellant noted that he was quite familiar with this type of truck as he then owned and drove a pickup truck of this kind. (T. 66).

After departing the diesel shop, appellant, with his helper as a passenger, traveled south on U.S. Route 177 towards Hamlet. (T. 47). As he approached a curve, appellant observed two oncoming vehicles approaching in a dangerous manner. (T. 47, 50). In an effort to avoid a collision, appellant braked and simultaneously drove his vehicle entirely off the roadway onto the right-hand shoulder. (T. 47, 48). Notwithstanding these precautions, one of the vehicles narrowly missed the appellant's truck while the other collided with it at a time when appellant's truck was entirely off the paved portion of the road. (T. 53, 54).

## IV.

## ARGUMENT

**The Court Properly Struck Appellant's Evidence And Entered Judgment For Seaboard As There Was No Evidence Whatsoever Of Any Negligence On The Part Of Seaboard.**

The basic rules governing disposition of FELA cases should be clearly stated at the outset. To begin with, cases are legion holding that there is no liability under FELA without fault; railroads are not the insurers of their employees.[5] In *Davis* v. *Virginia Ry.*, 361 U.S. 354 (1960), a case relied on by appellant in his brief, the Court chose to emphasize this point by beginning its opinion with the terse statement:

> "This is a negligence case. . . ." 361 U.S. at 354.

In another recent case, the Fifth Circuit put it this way:

> "Despite some loose talk to the contrary, the plain language of the Federal Employers' Liability Act makes unmistakably clear that it is not a workmen's compensation act but provides relief only for injury or death resulting in whole or in part from the *negligence* of the employer railroad, e.g.:
>
> > '* * * for such injury or death resulting in whole or in part from the *negligence* of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.' 45 U.S.C.A. § 51." Simpson v. Texas & N.O. R.R., 297 F.2d 660, 662 (5th Cir. 1962).

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[5] See, e.g., *Inman* v. *Baltimore & O. R.R.*, 361 U.S. 138 (1959); *Wilkerson* v. *McCarthy*, 336 U.S. 53 (1949); *Atlantic Coast Line R.R.* v. *Craven*, 185 F.2d 176 (4th Cir. 1950), *cert. denied* 340 U.S. 952 (1951); *Chesapeake & O. Ry.* v. *Burton*, 217 F.2d 471 (4th Cir. 1954); *Missouri Pac. R.R.* v. *Mendoza*, 337 S.W.2d 622 (Tex. Civ. App. 1960), *cert. denied* 365 U.S. 818 (1961); *Mensen* v. *Baltimore & O. R.R.*, 111 Ill. App.2d 362, 250 N.E.2d 303 (1969).

Thus, a party attempting to establish liability under FELA must prove negligence, *i.e.*, that an act or omission on the part of the railroad created an unreasonable risk which was or should have been foreseeable. In addition, there can be no liability if the negligent act or omission is only remotely related to the employee's injuries. While the strict common law requirement of *a single* proximate cause may be inappropriate in FELA cases, the authorities uniformly reflect that the alleged negligence must nevertheless be at least one of the causes proximately related to the injuries.[6]

Finally, it is unquestionably true that *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500 (1956) requires trial courts to be liberal in administering FELA. This does not mean, however, that trial courts should abdicate their responsibility and permit juries to render verdicts in the absence of any proof from which negligence and a proximate causal relation could be inferred.

With the foregoing basic principles before us, we turn now to an examination of the two contentions made by appellant in seeking to overturn the trial court, namely, (1) that Seaboard should not have permitted appellant to drive for if a driver had been furnished, appellant's departure might have been delayed with the possible result that the pickup truck carrying appellant would not have been at the scene of the collision at the instant of impact and (2) that in furnishing motor vehicle transportation,

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[6] See, e.g., *Brady* v. *Southern Ry.*, 320 U.S. 476 (1943), cited on page 6 of appellant's Brief; *Reed* v. *Pennsylvania R.R.*, 171 Ohio St. 433, 171 N.E.2d 718, *cert. denied* 366 U.S. 936 (1961); *Atlantic Coast Line R.R.* v. *Craven*, 185 F.2d 176 (4th Cir. 1950), *cert. denied* 340 U.S. 952 (1951); *Chesapeake & O. Ry.* v. *Burton*, 217 F.2d 471 (4th Cir. 1954); *Nicholson* v. *Erie R.R.*, 253 F.2d 939 (2nd Cir. 1958); *Reynolds* v. *Atlantic Coast Line R.R.*, 196 F.2d 643 (5th Cir. 1952); *Southern Ry* v. *Mais*, 192 Va. 68, 63 S.E.2d 720 (1951).

Seaboard failed to furnish a safe place to work simply because rail might be a statistically safer mode of transportation.

A. Permitting Appellant To Drive Was Not Negligent And Did Not Contribute In Whole Or In Part To Appellant's Injuries.

Appellant's contention that the failure to furnish a driver contributed somehow to his injuries is entirely specious. The fact is that the accident was solely the fault of the driver of the other vehicle and there was nothing appellant or any other driver could have done to prevent it.[7] On this point, the record is unequivocal; appellant was a well-qualified, competent driver with considerable experience in the type of pickup truck involved and, in any event, as the trial judge aptly put it, Barney Oldfield himself could not have avoided the wreck. (T. 89). Thus, the mere fact that appellant was driving is wholly without relevance. By the same token, the frequent suggestions in appellant's brief that it was not appellant's job to drive are also irrelevant.

But appellant's principal contention is not that Seaboard was unreasonable in permitting appellant to drive, but rather that but for the failure to furnish a driver, appellant might have been delayed in departing the diesel shop and, thus the accident would not have occurred as appellant would not have been at the accident site at the instant of impact. From this fallacious reasoning, appellant asks this Court to conclude that the failure to furnish a driver played a role in appellant's injuries.

This is, of course, a preposterous proposition, unworthy of consideration by this Court. Under such "but for" reasoning, the chain of causation would be infinite. Thus, con-

[7] Appellant testified, not surprisingly, that he has brought suit against the other driver in another court. (T. 66).

ceivably appellant himself "caused" the accident as "but for" his failure to remain in bed that day, he would not have been at the collision site at the time of impact.

Not surprisingly, no case cited by appellant supports his contention on this point. Much less surprising is the fact that those cases which have considered bizarre contentions of this nature have given them short shrift. Thus, in *Simpson* v. *Texas N.O. R.R.*, 297 F.2d 660 (5th Cir. 1962) the plaintiff, a railroad messenger, was required to resort to public transportation when his motorcycle broke down. After getting off the bus and while it was raining hard, he was struck by an automobile as he was in the process of crossing the street. Like the appellant in this case, the plaintiff in *Simpson* argued in essence that the railroad should be liable under FELA since but for the faulty motorcycle, plaintiff would not have had the accident. The Fifth Circuit had no difficulty rejecting this contention out of hand:

> "Plaintiff having left the motorcycle and gotten onto a public bus, the chain of causation between breakdown of the motorcycle and any subsequent occurrence was effectively broken, and plaintiff's situation was no different than it would have been if he were normally required to perform his duties on foot and by use of public transportation. Thereafter plaintiff's injuries were caused by an ordinary automobile accident which may have been unavoidable, or may have resulted from the negligence of the automobile driver, the negligence of the plaintiff, or both—but clearly not from the negligence of the defendant railroad. *To hold that defendant should have shielded plaintiff from ordinary traffic hazards is tantamount to making it an insurer.* The Act does not make the railroad company an insurer against personal injuries to its employees." 297 F.2d at 662.

Similarly, in *Nicholson* v. *Erie R.R.*, 253 F.2d 939 (2d Cir. 1958), the plaintiff was injured when a passenger on one of defendant's trains negligently struck her leg with a suitcase. Plaintiff was the only female railroad employee in the area and since there were no toilet facilities there provided for ladies, she was aboard that car for the purpose of using the ladies' room. Her theory of recovery was essentially identical to that advanced by the appellant in this case, namely, that but for the failure of the railroad to furnish toilet facilities for women, she would not have been on the car in which she was injured.

On these facts, the trial court granted the railroad's motion for a directed verdict and the Second Circuit affirmed, offering the following remarks especially pertinent to the case at bar:

> "The causation requisite for recovery under the F.E.L.A. is lacking.
>
> * * *
>
> "Speaking literally it cannot be denied that in the case at bar failure to supply toilet facilities 'played a part' in producing plaintiff's injury. If defendant had supplied indoor toilet facilities plaintiff would not have been where the passenger's baggage struck her. It is not enough, however, that the injury would not have happened 'but for' the negligence. Assume that plaintiff here, because of the delay incident to her long way around via the car's lavatory, took a train that arrived at Bloomfield fifteen minutes later than the one which she would have taken if toilet facilities had been furnished at her place of employment and that she was struck by an automobile in the street in Bloomfield on her way home from the station. She would have escaped injury 'but for' the failure to supply toilet facilities, yet the causation certainly would not even meet the modest requirements of the terms of the F.E.L.A. The fault

would be too far removed both in space and time from the injury." 253 F.2d at 940, 941.

This Court put this point more succinctly in a case relied on by appellant in his brief:

> "Events too remote to require prevision need not be anticipated." *Brady* v. *Southern Ry.*, 320 U.S. 476, 483 (1943).

In summary, the legal principles applicable here are neither novel nor disputed. To recover appellant must establish that Seaboard was negligent and that this negligence was the *legal cause* in whole or in part of his injury. Far from establishing this, allowing appellant to drive was not negligence on the part of Seaboard nor can it plausibly be said to have been the legal cause in whole or in part of appellant's injury. At most, appellant has shown only that, so far as Seaboard was concerned, his accident was an event far too remote to be anticipated.

B. The Trial Court Properly Excluded Statistical Evidence On The Comparative Safety Of Road And Rail.

The contention that the comparative statistical safety of rail over road transportation renders railroads liable under FELA if they fail to furnish rail transportation to their employees is at least as absurd as appellant's first contention. Acceptance of such a proposition would effectively make the railroad an insurer of its employees, a result specifically proscribed by Congress and the Supreme Court.

Here again, it is not at all surprising that none of the cases cited by appellant support his position. Unlike the case at bar, all of the cases cited on this point in appellant's brief involve some act or omission on the part of the railroad reasonably amounting to negligence. Thus, in *Davis* v. *Virginian Ry.*, 361 U.S. 354 (1960), the railroad argu-

ably furnished plaintiff with an unsafe place to work by assigning inexperienced men to assist him and by requiring him to complete a difficult spotting job within 30 minutes.

So absurd is appellant's contention in this regard that it is no wonder that the precise point has not arisen in the reported cases. Analogous authority, however, leaves no doubt as to the unsoundness of appellant's position. Thus, in *Roucken* v. *Erie R.R.*, 174 N.Y.S.2d 427 (1958), plaintiff, a flagman, was injured when a tractor-trailer experienced a brake failure and struck the shanty provided for him by the railroad. Plaintiff there contended that the railroad failed to furnish him with a safe place to work inasmuch as the shanty was constructed too close to the roadway and did not have a window facing easterly to permit him to see oncoming traffic. The court quickly rejected this contention, stating that:

> "In our opinion, neither the location of the shanty nor the absence of a window facing easterly may be said to have constituted negligence proximately contributing to the accident. Furthermore, that the truck going westerly would veer to the left and go off to the south of the roadway was an event too remote to have been reasonably anticipated." 174 N.Y.S.2d at 429.

In the same vein, the plaintiff in *Atlantic Coast Line R. R.* v. *Craven*, 185 F.2d 176 (4th Cir. 1950), *cert. denied* 340 U.S. 952 (1951) was injured while he was climbing over a gondola car in an effort to traverse a crossing blocked by the gondola car. Plaintiff there made no attempt to show that the car was unsafe or defective. Instead plaintiff argued that the railroad should have constructed a bridge or tunnel or scheduled trains so as not to block the crossing. The Fourth Circuit found no merit in plaintiff's argument, remarking that,

> "We do not see how ordinary prudence could have required the construction of a bridge or a tunnel, or the disruption of the railroad's activities suggested by the plaintiff. That remedy would have been all out of proportion to the risk involved." 185 F.2d at 179.

Also controlling on this point is *Inman* v. *Baltimore & O. R.R.*, 361 U.S. 138 (1959), where the plaintiff, a flagman, sued the railroad to recover for injuries received when an intoxicated automobile driver ran into him while he was on duty one night flagging traffic for a passing train. Plaintiff's theory in that case was that the crossing layout was inherently unsafe. The Supreme Court, in an opinion written three years after the *Rogers* case, affirmed a judgment for defendant. Mr. Justice Whittaker felt compelled to make some trenchant remarks in a concurring opinion which are peculiarly appropriate to the case at bar.

> "Reduced to substance, the simple facts are that petitioner, a crossing flagman, while standing in a well-lighted intersection alongside a passing train in the nighttime and swinging a lighted red lantern in each hand, was struck, knocked down and run over by a drunken driver. What, I ask, did respondent do or omit that caused or contributed to cause that casualty? How could it have prevented the casualty? Petitioner says that respondent failed to provide him with 'enough protection.' About the only way, as I perceive, that respondent could protect its crossing flagman against injury from such lawless conduct by third persons would be to provide them with military tanks and make sure they stay in them while within or moving about crossing-intersections in the performance of their duties—and I am not even sure that this method, though ironclad, would be certain protection to a flagman against lawless injury by third persons, for someone might shoot him, an act not very different, it seems

> to me, from the drunken driver's conduct which injured petitioner in this case, and for which injuries he insists, and four members of this Court agree, a jury should be permitted to require respondent to pay damages. How this can be thought to square with any known concept of 'negligence' by respondent is beyond me." 361 U.S. at 142.[8]

So in this case, it is impossible to see how the mere furnishing to appellant of motor vehicle rather than rail transportation can be said to square with any known concept of negligence.

## V.

## CONCLUSION

In conclusion, by no stretch of the imagination can it be said that the railroad custom of transporting hostlers by motor vehicle rather than by rail constitutes negligence under FELA simply because rail transportation may be statistically safer. At least as fanciful is the proposition that the failure to furnish appellant with a driver contributed in whole or in part to appellant's injuries simply because had one been supplied, plaintiff might not have been at the point of impact at the precise time of impact.

Put simply, the appellant's injuries in this case were *entirely* the result of the negligence of the driver of the other vehicle. As the Fourth Circuit has stated,

> "Before a case, under the Federal Employers' Liability Act, may be left to the jury, there must be more than a mere breath of evidence which tends to show negligence on the part of the railroad." *Chesapeake & O. Ry.*, v. *Burton,* 217 F.2d 471, 473 (4th Cir. 1954).

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[8] See also *Emmick* v. *Baltimore & O. R.R.*, 339 Ill. App. 148, 88 N.E.2d 739 (1949), *cert. denied* 340 U.S. 831 (1950).

In the case at bar, there is not even a breath of evidence tending to show negligence on the part of Seaboard.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that three copies of the foregoing brief were mailed to Willard J. Moody, Esquire, Moody, McMurran and Miller, 200 Professional Building, Portsmouth, Virginia 23704, counsel for Petitioner, this 1st day of September, 1972.

EPPA HUNTON, IV